DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DIVISION, GREAT LAKES AND OHIO RIVER
CORPS OF ENGINEERS
P. O. BOX 1159
CINCINNATI, OHIO 45201-1159

REPLY TO
ATTENTION OF

CELRD-CM-O

DEC 4 2000

Mr. Nyal D. Deems
Varnum, Riddering, Schmidt & Howlett LLP
Bridgewater Place
P.O. Box 352
Grand Rapids, Michigan 49501-0352

Dear Mr. Deems:

Reference your Request for Appeal (RFA) of the permit denial for File No. 88-245-003-5, received September 5, 2000, on behalf of The Bayberry Companies. Your request for appeal has been reviewed and remanded to the District Engineer for one of the two reasons raised. The decision document and related information are enclosed.

If you have any questions about the decision you may contact Ms. Suzanne Chubb, the Review Officer, at the above address or call her at 513-684-7261. The Detroit District Engineer will contact your client and/or yourself. If you wish, you may contact the District staff for further information.

Sincerely,

Robert H. Griffin
Brigadier General, U.S. Army
Division Engineer

Enclosures
As Stated

Copy furnished:
Detroit District Commander
HQUSACE

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REPLY TO
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DEC 2 2000

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MEMORANDUM FOR: Commander Detroit District

SUBJECT: Appeal Decision for Permit Denial, File No. 88-245-003-5, Received September 29, 2000, on behalf of The Bayberry Companies.

The subject appeal is remanded for review of the administrative record. The record must be further clarified as I have set out in the enclosed decision. Information received during the appeal process and deemed to be "new" information is also enclosed for your review and consideration.

Encl
As

ROBERT H. GRIFFIN
Brigadier General, U.S. Army
Commanding

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ADMINISTRATIVE APPEAL DECISION

THE BAYBERRY COMPANIES, FILE NO. 88-245-003-5

DETROIT DISTRICT

DECEMBER 4, 2000

Review Officer: Suzanne Chubb, U.S. Army Corps of Engineers, Great Lakes & Ohio River Division, Cincinnati, Ohio.

Appellant Representative: Mr. Nyal D. Deems, Varnum, Riddering, Schmidt & Howlett LLP, Grand Rapids, Michigan.

Permit Authority: Section 404 of the Clean Water Act (33 USC 1344)

Receipt of Request For Appeal (RFA): September 5, 2000

Appeal Conference Date: October 17, 2000 **Site Visit Date:** October 17, 2000

Background Information:

The appellant, The Bayberry Companies, requested a Department of the Army permit to impact wetlands for a proposed 18-hole golf course and associated housing on a 267-acre site in Glen Arbor, Michigan. The project site is adjacent to The Homestead resort (co-appellant) and the Sleeping Bear Dunes National Lakeshore. County Road 675 bisects the site with a 47-acre parcel of the project site located north of the road and a 220-acre parcel south of the road. The appellant currently owns 39.5 acres of the northern 47-acre parcel and has an option to purchase an additional 7.5 acres. The Crystal River flows along a sinuous path through the northern parcel and forms the northern border of the southern parcel.

The appellant's preferred project design located four golf holes north of the road with the remaining fourteen golf holes and associated housing south of the road. Wetland impacts include 3.65 acres of wetland filled and 10.16 acres of wetland cleared (13.81 acres total impact). Mitigation offered to offset the impacts was 6.83 acres of wetland creation, 0.28 acre of wetland restoration and 2.23 acres of wetland enhancement (habitat conversion).

An alternative golf course design, provided in April 2000, and a housing-only option were also considered by the Detroit District (District). Alternative 3(e) proposes to locate all eighteen holes of the golf course south of County Road 675 with unregulated residential housing development of the northern parcel. The proposal would entail the following impacts: 4.1 acres of wetland filled, 6.2 acres of wetland cleared, and 1.2 acres of wetland excavated (11.5 acres total impact). For mitigation, the appellant has offered to purchase and preserve the 7.5- acre parcel of land within the northern parcel on which

they have an option. They are unwilling to preserve any portion of the 39.5 acres that they currently own.

On July 7, 2000, the DE denied the appellant's preferred alternative as well as alternative 3(e). The housing-only alternative, utilizing both north and south parcels and designed to avoid all Army Corps of Engineers regulatory jurisdiction, was also evaluated and found to have significant adverse impacts to the aquatic environment similar to alternative 3(e). The DE did determine that a permit could be issued for a golf course confined to the southern parcel that incorporated further minimization of wetland impacts and avoidance of the riparian corridor. Special conditions on this alternative would include the need for a detailed and enforceable water quality monitoring plan and the permanent conservation of the 47-acre northern parcel. The appellant filed a Request For Appeal on September 5, 2000.

Basis for Appeal as Presented by Appellant:

Reason 1: "There are not significant overriding issues and national concern necessary to override the state MDEQ (Michigan Department of Environmental Quality) permit decision."

Reason 2: "We believe the decision is erroneous under the policies of Paragraph 320.4." (33 CFR 320.4)

Summary of Decision: I find that the appeal has merit. Although the Detroit District's environmental assessment sufficiently addresses the significant overriding issues of national concern, the District should review its record relative to 33 CFR 320.4. The District should also review and consider the enclosed information that was received during the appeal process and deemed "new".

Appeal Evaluation, Findings and Instructions to the Detroit District Engineer (DE):

Reason 1: "There are not significant overriding issues and national concern necessary to override the State MDEQ permit decision."

FINDING: Appeal does not have Merit.

ACTION: No action required.

DISCUSSION:

When a permit decision is contrary to state and local decisions, regulations at 33 CFR 325.2(a)(6) require the inclusion of significant national issues within the decision document and an explanation of how they are overriding in importance. The district's decision document fully describes the national issue they considered to be of significant overriding importance – the preservation of aquatic resources (both wetlands and waters) that have significant interstate importance from tourism and migratory birds. A specific discussion of this item can be found on pages 3-5 of the Statement of Findings.

Within the Environmental Assessment (EA), Sections 2B and 2C (pages 38-42) discuss the high water quality of the Crystal River, its riparian corridor, and the unique character of the ridge-swale wetland landform. Enclosure 40 of the EA is referenced for detailed information on the riparian corridor. Additional information is contained in Section 3A1 under the specific heading for "Effects on Water Quality" (pages 42-52) and Sections 3B2 and 3B3 ("Effects on Terrestrial Biota" and "Effects of Wetlands", respectively, pages 55-59) regarding impacts to the riparian corridor and wetlands. Impacts to interstate tourism, in the form of water-related recreation on the Crystal River, is discussed extensively under section 3C, Social Impacts (Visual Aesthetics, Recreation, Safety and Land Use Patterns, pages 67-74). The District's consideration of area land use patterns considered the potential adverse impacts to the adjacent Sleeping Bear Dunes National Lakeshore (EA pages 73-74). Additionally, the District determined that the ridge-swale landform is a significant natural resource feature (Section 3B4, Effect on Conservation and Overall Ecology, pages 60-67).

The appellant disputes that the ridge-swale landform is a rare or significant landform and stated at the appeal conference that the proposed project will not impact the significant national issues raised in the District's environmental assessment - interstate tourism and waterfowl use associated with the river.

The District reached a different conclusion and I find that their EA sufficiently supports their decision. The EA referenced comments from the Department of Interior, U.S. Fish and Wildlife Service and National Park Service, as well as a 1993 survey report of wooded dune and swale complexes in Michigan completed by the Michigan Natural Features Inventory (EA enclosures 38c and 70 respectively). While the survey concentrated on the presence of this landform in Michigan, the authors communicated with specialists throughout the Great Lakes region and provided a sense of the importance of this landform within the state of Michigan. They found that the landform is limited to the Great Lakes region of North America and estimated that 90-95 complexes once occurred in the region of which approximately 70 occurred in Michigan (approximately 75% of the total). At that time, only 40 of the 70 sites in Michigan retained "a significant undisturbed natural character", including the Crystal River complex. The remaining landforms were once found in Wisconsin, Indiana, Illinois, Ohio and Pennsylvania but their current status is not given in the report. The report characterizes these communities as globally rare.

Reason 2: "We believe the decision is erroneous under the policies of Paragraph 320.4." (33 CFR 320.4)

FINDING: Appeal has Merit.

ACTION: I recommend that the District review its record regarding the onsite avoidance, minimization and mitigation of alternative 3(e). The District should ensure that the record complies with regulations promulgated at 33 CFR 320.4 and that the record explains and supports any suggested project design and mitigation.

DISCUSSION:

Regulations at 33 CFR 320.4 dictate what factors are to be included in the public interest review. They state "Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits, which reasonably may be expected to accrue from the proposal, must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process." The Regulations do not state how the weighing and balancing is to be accomplished.

With regard to the District's overall evaluation of the public interest factors, I find that the District exhibited a fair and flexible balancing of protection of the aquatic environment and the needs of the applicant when it found that an authorized project is possible on this parcel. Given that this location contains a ridge-swale landform unique to the Great Lakes region and that unregulated development and impacts to the landform are occurring in this area, the District placed additional weight on cumulative impacts, adjacent land use and environmental factors. The District relied on their own education, experience and best professional judgement and also enlisted the help of experts at the Corps' Waterways Experiment Station (WES) to assist in the evaluation of water quality impacts. The applicant may supply all the documentation he wishes in support of their determination of impacts, however, the final determination is made by the Corps of Engineers.

The District also correctly considered and evaluated both the mechanized and non-mechanized forms of land clearing impacts to the onsite wetlands and the water quality of the Crystal River (EA pages 3-5). Although non-mechanized land clearing within a wetland is unregulated by the Corps, it is an impact to an aquatic resource that is directly related to other regulated activities involved in the construction of this proposed golf course. The Corps' authority to consider indirect project impacts is derived from the NEPA (National Environmental Policy Act) implementation procedures for the Regulatory Program at 33 CFR 325, Appendix B. Part 7(b) of these regulations provides a discussion on determining the scope of analysis under NEPA.

However, I find that confusion has resulted over the onsite alternatives analysis, an analysis that is part of both the public interest review [33 CFR 320.4(r)] and the 404(b)(1) Guidelines. Throughout the application review, the appellant did not formally withdraw their preferred alternative design even though they provided other project designs to the District. I find no fault with the District's evaluation of the appellant's preferred alternative. However, the District went to great lengths to evaluate other alternatives, including 3(e), that the appellant never officially supported. Furthermore, the District suggests that further minimization of aquatic impacts in alternative 3(e), along with the preservation of the northern 47-acre parcel and a detailed, enforceable water quality monitoring plan, would likely receive a permit.

The appellant implied, in its letter dated January 29, 2000 (EA Enclosure 63), that alternative 3(e) and the preservation of a 7.5- acre parcel north of the road, but not the entire 47-acre northern parcel, may be an acceptable and viable alternative. On page one, the letter states that "Our Board did not then and does not now believe that Mr.

Mannesto's suggestion, when considered from the perspective of costs, logistics and existing technology, constitutes a practicable alternative capable of fulfilling the project purpose." However, on page three, the letter states, "If your decision is negative on our proposed project, positive on the alternative Mr. Mannesto has suggested, we will immediately ask our Board to make a formal decision on that alternative and advise you accordingly."

Furthermore, while the District discusses how both project designs will impact the various public interest factors, the record reflects comments from the public and resources agencies on only the applicant's preferred alternative and a withdrawn alternative labeled "Alternative 3(d)". The record should clearly reflect the extent of coordination of alternative 3(e) and should indicate if the evaluation of alternative 3(e) is based on comments pertaining to alternative 3(d). While this approach may be valid, the record is unclear on this issue.

Although Mr. Robert Walker, the golf course architect, has some professional reservations regarding this design, and it may not fulfill all of the appellant's original intent, alternative 3(e) is a less environmentally damaging alternative. The appellant has, to date, not provided an official indication of the acceptability of alternative 3(e).

In addition to confusion regarding the onsite alternatives and their respective impacts, I also find that the District's justification for the suggested mitigation is insufficient. While I recognize that avoidance and minimization were the District's primary focus, the record should also clearly explain and support any suggested mitigation.

In summary, I have considered the appellant's efforts to reduce project impacts to wetlands and water quality. Likewise, their alternatives analysis, economic analysis, and information regarding associated project features (driving range and housing) is extensive. The District's permit decision found that certain mitigation requirements and revisions to alternative 3(e) were necessary to avoid potential significant degradation of waters of the U.S. and to ensure compliance with the 404(b)(1) Guidelines. However, upon review of its record, the District may be able to suggest other project designs or mitigation options.

Information Received and its Disposition during the Appeal Review:

A ten-page letter dated October 11, 2000 from Mr. Nyal Deems of Varnum, Riddering, Schmidt & Howlett LLP. A large binder of information accompanied the letter. The information was tabbed and organized into 26 items. Of these items, ten could not be located within the District's record (Tabs 2, 4, 5, 6, 7, 8, 9, 12, 13 and 26). The list below itemizes each item and cross-references the information to the District record where possible. The items that were not found in the District's file were categorized as clarifying information, new information (for consideration by the District) or irrelevant.

Tab 1 – August 27, 1990 MDNR contested case hearing, EA enclosure 6
Tab 2 – February 24, 1992 MDNR letter to USEPA Region 5
Disposition: Considered Irrelevant.
Tab 3 – May 8, 1992 USEPA(HQ) statement, EA enclosure 12

Tab 4 – April 15, 1994 State Circuit Court opinion on Friends of the Crystal River v Kuras Properties and MDNR. **Disposition: Considered Irrelevant.**

Tab 5 – August 3, 1998 Appellant letter to Dr. Daniel Palmer
Disposition: Clarifying information; Letter referenced in EA enclosure 71d.
- June 10, 1994 Appellant letter to Dr. Daniel Palmer, EA enclosure 71c
- May 24, 1994 Dr. Daniel Palmer letter to Appellant, EA enclosure 71b

Tab 6 – "An Environmentally Sound Weed Management Program", 8-page report dated October 1999 by Dr. Bruce Branham.
Disposition: New Information (enclosed).

Tab 7 – "Proposed Biting Fly Control Program" dated March 1987 and revised July 1989 (23 pages) with a 2-page Executive Summary and 4-page July 20, 1999 Addendum, by Dr. Richard Merritt.
Disposition: New Information (enclosed).

Tab 8 – "Pro-Environmental Insect Management Plan for The Homestead Golf Course", 2-page report dated July 15, 1999 by Mr. David Smitley.
Disposition: New Information (enclosed).

Tab 9 – "Grassing Plan and Disease Management Recommendations", 3-page update to 1989 report by Dr. Vargas.
Disposition: New Information (enclosed).

Tab 10 – December 21, 1999 Appellant letter to CELRE, EA enclosure 60b

Tab 11 – January 5, 2000 Appellant letter to CELRE, EA enclosure 61b

Tab 12 – January 10, 2000 Appellant letter to CELRE regarding project purpose
Disposition: Clarifying information; Received and considered by the District and erroneously not referenced in EA – Harmless error

Tab 13 – January 28, 2000 Appellant letter to CELRE regarding court cases
Disposition: Clarifying information; Received and considered by the District but not referenced in the decision document

Tab 14 – January 29, 2000 Appellant letter to CELRE, EA enclosure 63

Tab 15 – February 11, 2000 Appellant letter to CELRE, EA enclosure 65

Tab 16 – March 13, 2000 Northern Ecological Services (NES) letter to CELRE, EA enclosure 66a

Tab 17 – March 15, 2000 NES letter to CELRE, EA enclosure 67

Tab 18 – April 24, 2000 Mr. Stuart Cohen letter to CELRE, EA enclosure 68c

Tab 19 – April 24, 2000 Appellant letter to CELRE, EA enclosure 68b

Tab 20 – April 21, 2000 NES letter to CELRE, EA enclosure 68a

Tab 21 – April 24, 2000 Mr. Stuart Cohen letter to CELRE EA enclosure 68c

Tab 22 – April 25, 2000 Mr. Robert Walker letter to CELRE, EA enclosure 68d

Tab 23 – April 28, 2000 Mr. Nyal Deems letter to CELRE, EA enclosure 68e

Tab 24 – May 3, 2000 Mr. Kenneth Doud, Jr. letter to CELRE, EA enclosure 68g

Tab 25 – May 3, 2000 Mr. Zimmerman letter to CELRE, EA enclosure 68f

Tab 26 – June 7, 2000 Environmental & Turf Services, Inc. letter to CELRE regarding water quality monitoring. **Disposition: Clarifying information; Received and considered by the District but not referenced in the decision document.**

Conclusion:

For the reasons stated above, I conclude that this administrative appeal has merit. The District should review its record relative to 33 CFR 320.4 and also review and consider the enclosed information that was received during the appeal review and deemed "new".

Encl

ROBERT H. GRIFFIN
Brigadier General, U.S. Army
Commanding